No. 21,172 A & B

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee and Petitioner,

vs.

ALAN HARVEY RICE, LAWRENCE SANFORD TOROKER, EDDIE JAVOR,

Appellants and Respondents.

PETITION FOR REHEARING.

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
RONALD S. MORROW,
Assistant U. S. Attorney,
1200 U. S. Courthouse,
312 North Spring Street,
Los Angeles, Calif. 90012,
688-2434; 688-2413,
Attorneys for Appellee and Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable Judges: Browning and Ely of the United States Court of Appeals for the Ninth Circuit and Foley of the District of Nevada, sitting by designation.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellee herein respectfully petitions this Court for rehearing in the above-captioned case. The judgment of this Court was rendered on July 17, 1968, and by order of Judge Ely the United States has to and including August 16, 1968, within which to file this petition.

The Court Has Misapprehended the Effect of Bruton v. United States on the Case at Bar.

In the *Per Curiam* opinion of this Court the conviction of Eddie Javor was reversed for the stated reason that *Bruton v. United States,* ..... U.S. ....., 36 U.S.L.W. 4447 (decided May 20, 1968), "requires reversal" [P. 3, Slip Opinion].

Bruton does not apply because the prior statements of Toroker and Rice were admitted for impeachment as to them only (and, therefore, within a recognized exception to the hearsay rule); Toroker and Rice testified for Javor; Toroker and Rice were subject to confrontation; and the prior statements of Toroker and Rice were not used until after they took the stand and testified for Javor.

Bruton, supra, at 4448, states that the admission of the co-defendant's "confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment . . ." The facts of *Bruton* were that neither defendant testified or offered any evidence at the trial, *Evans v. United States,* 375 F. 2d 355, fn. 2 at 357 (8th Cir. 1967). The confession of Evans was used in the prosecution's case-in-chief.

No reference was made as part of the Government's case-in-chief to the fact that Toroker and Rice named Javor as their source of narcotics in post arrest statements. At 514 of the Reporter's Transcript appears a stipulation that Toroker and Rice had confessed. Both Toroker and Rice stipulated that on an earlier occasion they had confessed to the crimes alleged in the indictment.

The defense of the defendants Toroker and Rice was that they had taken LSD over extensive periods of time and transferred the narcotics in question out of a feeling of love for the agents; the agents' "need"; and the agents' threats. The attorneys for Toroker and Rice stated that the defense was that neither man could resist the "persuasion, inducements, and enticements" of the agents [R. T. 536-42; 543-46].

After Toroker related his experiences with LSD and his motivation for doing what he did, he stated on direct examination by his attorney that "Nick" was the source of the narcotics [R. T. 701-02; 705; 710; 711; 715-16]. During examination of Toroker by Javor's attorney, Toroker testified that he knew Javor only in connection with redecorating [R. T. 869-72]. On cross by Government counsel Toroker again said it was "Nick" who provided the narcotics [R. T. 898; 939-40], and said he had not told the agents about "Nick" [R. T. 907]. It was at that point in the trial, and not before, that the Government was allowed to use the previous statement of Toroker for impeachment purposes only as to the source, and the connection with Javor [R. T. 948-59; 962-63; 965-67; 971; 973-74]. Judge Curtis instructed the jury that the use of the prior statement applied only to Toroker at R. T. 941-48; 951; 955; 956; 958; 966; 967; 968 and 974. Following the use of the prior statement by the prosecution, Toroker's attorney used the written statements for rehabilitation and Toroker denied, as a matter of fact, that Javor was the source [R. T. 1000-11]. Javor's attorney then brought out that Javor was not the source [R. T. 1012].

Rice, in his direct testimony, made only one reference to "Nick," at R. T. 1054, and did not mention that he knew Javor in connection with redecorating. Rice's reference to "Nick" was as follows: "And Mickey said, 'Yeah, sure.' His boy Nick could supply anything." Javor's own attorney, at R. T. 1076, called Rice as Javor's witness and elicited, at 1077, that Rice's connection with Javor was relative to roof, lighting, upholstery work, a wet bar and "things like this." It was only after Rice testified in answer to Javor's calling him that any reference was made to the previous statements of Rice as to Javor being his source.

There is only one conclusion that can be drawn from the trial testimony of Toroker and Rice—Javor, Toroker, and Rice agreed that Toroker and Rice would exonerate Javor as the source. The testimony of Toroker and Rice relative to "Nick" and Javor had no relevance or materiality to their own defense. To believe that the "Nick" and redecorating testimony was anything more than directed to aiding Javor is unrealistic.

In *Bruton* the Supreme Court said the following, in footnote 3:

> ". . . There is not before us . . . any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatsoever that such exceptions necessarily raise questions under the Confrontation Clause."

In the instant matter there is the "recognized exception to the hearsay rule"—the right to use prior inconsistent statements for impeachment purposes. Javor examined Toroker on the "Nick" and redecoration de-

fenses of Javor and, in fact, called Rice as his own witness on the redecorating defense. The Government views the present decision as leading to the undesirable, and unavoidable, conclusion, that if Javor were being tried at a severed trial, and he called Toroker and Rice to exonerate him, that the prior inconsistent statements would be inadmissible. There is no logical distinction between an accomplice and a non-accomplice when the issue is that particular witness' credibility.

It was only after Toroker and Rice had testified that their prior written statements were used for impeachment.

> "Under the circumstances the government was not required to stand idly by and let the testimony go unchallenged." *United States v. Grosso,* 358 F. 2d 154, 162 (3rd Cir. 1966), *rev'd on other grounds, Grosso v. United States,* 390 U.S. 62 (1968).

Grosso, is the last case that has been located that has reached the Supreme Court on a *Walder, Infra.,* situation. In *Grosso,* Grosso stated he had had no connection with a numbers lottery since 1950. The prosecution was allowed to introduce evidence which showed such connection.

In *Walder v. United States,* 347 U.S. 62 (1954), the prosecution had in its possession evidence relative to a prior possession of narcotics which had been ordered suppressed. The defendant took the stand and testified he had never had any narcotics in his possession. The Supreme Court stated its issue was "whether the defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for the

purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding." The Supreme Court, at 65, answered the issue posed in the affirmative with the following:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the "Weeks" doctrine would be a perversion of the Fourth Amendment.
>
> Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Citations omitted.)

In the instant case Toroker and Rice went "beyond a mere denial of complicity" when they attempted to

exonerate Javor. In the instant case the evidence used was not illegally or unconstitutionally obtained but, merely inadmissible in the Government's case-in-chief under the retroactive application of *Bruton.*

Groshart v. United States, No. 21,517 (9th Cir., decided March 27, 1968), is the only Ninth Circuit case found which mentions *Walder. Groshart* specifically does not apply to the instant case. In footnote 5 of the Slip Opinion the Court states that its judgment only holds that *Miranda* undercuts *Walder* when statements are *obtained* in violation of constitutional standards.

In *Bruton* and *Douglas v. Arizona,* 380 U.S. 415 (1965), the factual situations considered in *Bruton,* the testifying witness either did not testify at all or refused to testify. In such a situation there is truly no confrontation. In the instant case there is not only a confrontation but a calling for on cross and direct the matter which opened the door.

Conclusion.

To allow the Court's present decision to stand will invite perjury in future trials whether the witnesses are or are not parties to the action.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant U. S. Attorney,

Attorneys for Appellee and Petitioner.